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**COPY MAILED**  
**JUN 27 2006**  
**OFFICE OF PETITIONS**

In re Application of	:	
Culpepper, et al.	:	
Application No. 09/839,616	:	DECISION
Filing Date: 20 April, 2001	:	
Attorney Docket No.: D-3032	:	

This is a decision on the petition filed on 26 May, 2006, alleging unintentional delay under 37 C.F.R. §1.137(b).

**NOTES:**      **Petitioner does not appear to be Counsel of Record or otherwise empowered to prosecute the instant application. In this connection, Petitioner must file of record the appropriate revocation/power of attorney.**

**Moreover, the correspondence address of record are different than that shown on the papers submitted herein. However, Petitioner has submitted no formal change(s) in this regard.**

**If Petitioner desires to receive future correspondence regarding this application, the appropriate Notice of Change of Address (for correspondence) and Fee Address must be submitted.**

**A courtesy copy of this decision will be mailed to Petitioner. However, all future correspondence will be directed to the address of record until such time as appropriate instructions are received to the contrary.**

- (1) Any petition (and fee) for reconsideration of this decision under 37 C.F.R. §1.137(b)<sup>1</sup> (as to unintentional delay) must be submitted within two (2) months from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(b)."
- (2) Thereafter, there will be no further reconsideration of this matter.

For the reasons set forth below, the petition under 37 C.F.R. §1.137(b) is **DISMISSED**.

**Petitioner was not of record at the time the instant application went abandoned, and, thus, is unable to make a statement as to unintentional delay.**

**To this end, former Counsel, the Applicant, or the Assignee (or representative thereof) are individuals who may be competent to attest in this matter.**

### **BACKGROUND**

The record reflects that:

- Petitioner failed to reply timely and properly to the final Office action mailed on 19 April, 2002 (the full paper file is not available at this writing and the Image File Wrapper (IFW), does not contain all of the substantive papers in this regard, and so the PALM record is relied upon for this history), with reply due absent extension of time on or before 19 July, 2002;

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<sup>1</sup> Effective December 1, 1997, the provisions of 37 C.F.R. §1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 C.F.R. §1.137(b). a grantable petition filed under the provisions of 37 C.F.R. §1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 C.F.R. §1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee set forth in 37 C.F.R. §1.20(d)) required pursuant to 37 C.F.R. §1.137(c). (Emphasis supplied.)

- the instant application went abandoned after midnight 19 July, 2002;
- the Office mailed a Notice of Abandonment on 10 December, 2002;
- Petitioner filed the instant application (with fee), a reply in the form of a request for continued examination (RCE) and fee and an amendment as the submission under 37 C.F.R. §1.114, and made the statement of unintentional delay—however, in light of:
  - the period of forty-six (46) months from the date of abandonment and forty-one (41) months from Notice thereof before filing of the instant petition;
  - the allegation that the attorney responsible is no longer available;
  - the listing, at the time of abandonment, of at least six (6) registered practitioners authorized to act in the matter; and
  - the instant Petitioner was not of record at the time of abandonment;

the Office will require additional information, statements, records, and evidence—explanation and examples of which Petitioner is directed to the Commentary at MPEP §711.03( c) for guidance.

### STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).<sup>2</sup>

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for

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<sup>2</sup> 35 U.S.C. §133 provides:

**35 U.S.C. §133 Time for prosecuting application.**

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

the reply now to be accepted on petition.<sup>3</sup>

Delays in responding properly raise the question whether delays are unavoidable.<sup>4</sup> Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).<sup>5</sup> And the Petitioner must be diligent in attending to the matter.<sup>6</sup> Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.<sup>7</sup>))

As to the Allegations  
of Unintentional Delay

The requirements for a grantable petition under 37 C.F.R. §1.137(b) are the petition and fee, a statement/showing of unintentional delay, a proper reply, and—where appropriate--a terminal disclaimer and fee if the application was filed before 8 June, 1995.

Because Petitioner appears not to have been of record at the time the instant application went abandoned, Petitioner is not able to aver the unintentional nature of the abandonment.

To this end, Petitioner must provide a statement by an attorney of record at the time the application went abandoned as to the unintentional nature of that event—and there will be a requirement as to docketing and other records such as might support the averments.

Therefore, it appears that Petitioner has not satisfied the “statement and showing” requirements under the regulation.

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<sup>3</sup> Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

<sup>4</sup> See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

<sup>5</sup> See: *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

<sup>6</sup> See: *Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment*, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

<sup>7</sup> Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

CONCLUSION

The petition under 37 C.F.R. §1.137(b) hereby is **dismissed**.

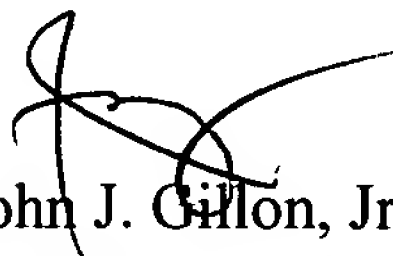
Further correspondence with respect to this matter should be addressed as follows:<sup>8</sup>

By mail: Commissioner for Patents<sup>9</sup>  
P.O. Box 1450  
Alexandria, VA 22313-1450

By FAX: IFW Formal Filings  
(571) 273-8300  
ATTN.: Office of Petitions

By hand: Mail Stop: Petition  
Customer Service Window  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Telephone inquiries concerning this decision may be directed to the undersigned at (571) 272-3214.



John J. Gillon, Jr.  
Senior Attorney  
Office of Petitions

cc:  
CYNTHIA R. PARKS  
PARKS KNOWLTON LLC  
1117 PERIMETER CENTER WEST/STE. W307  
ATLANTA, GA 30338

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<sup>8</sup> On July 15, 2005, the Central Facsimile (FAX) Number changed to (571) 273-8300. Faxes sent to the old number no longer are routed to the new number. The number (571) 273-8300 is the only facsimile number recognized for centralized delivery. (For further information, see: <http://www.uspto.gov/web/offices/pac/dapp/opla/preognotice/cfax062005.pdf>.)

<sup>9</sup> To determine the appropriate addresses for other subject-specific correspondence, refer to the USPTO Web site at [www.uspto.gov](http://www.uspto.gov).